

MAR 17 2010

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

JOHN F. GORRORAN, CLERK  
BY:   
DEPUTY CLERK

UNITED STATES OF AMERICA

v.

LANDY DIAZ,

Defendant.

)  
) Case No. 7:07CR00003  
) (Case No. 7:09CV80138)

)  
)  
) FINAL ORDER

) By: Hon. Glen E. Conrad  
) United States District Judge  
)

This federal habeas action is before the court upon the Report and Recommendation of the United States Magistrate Judge, prepared pursuant to 28 U.S.C. §636(b)(1)(B). The Magistrate Judge recommended that the motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. §2255, be granted to the extent that the defendant be permitted to pursue an appeal of the criminal judgment against him. The fourteen days allotted for parties to object to the findings and recommendations in the Magistrate Judge's Report have expired, and neither party has filed objections. Accordingly, it is hereby

**ADJUDGED AND ORDERED**

as follows:

1. The Report and Recommendation of the Magistrate Judge shall be and hereby is **ADOPTED** to the extent that it recommends granting the defendant a renewed opportunity to appeal and finds facts in support thereof;
2. The government's Motion to Dismiss is **DENIED**;

3. The motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. § 2255, shall be and hereby is **GRANTED** as to the defendant's claim that ineffective assistance of counsel deprived him of the right to appeal;

4. The defendant's remaining § 2255 claims are **DISMISSED** without prejudice, in light of his opportunity to raise these or related issues on appeal, see United States v. Killian, 22 Fed. App'x 300, 301 (4th Cir. 2001);

5. The clerk is **DIRECTED** to prepare and enter an Amended Judgment, in every respect the same as the previous Judgment except as to date of entry,<sup>1</sup> and upon entry of the Amended Judgment, the previous Judgment **SHALL** be vacated;

6. Upon entry of the Amended Judgment, the clerk **SHALL** enter a Notice of Appeal from the Amended Judgment on behalf of the defendant;

7. Counsel appointed to represent the defendant in the § 2255 proceedings **SHALL** consult with the defendant regarding the advantages and disadvantages of pursuing the appeal, and if agreeable to the defendant and counsel, may pursue a motion in the Court of Appeals to continue representing the defendant for the appeal; and

8. The clerk **SHALL** close the § 2255 case, nothing further remaining to be done therein.

The Clerk is directed to send a copy of this order to the defendant at his current place of incarceration and to counsel of record for the defendant and the government.

ENTER: This 17<sup>th</sup> day of March, 2010.

  
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United States District Judge

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<sup>1</sup> The previous Judgment was entered February 29, 2008, with additional attachments added on March 4, 2008.